

# **ANALYSIS OF THE JUDGMENT OF THE HIGH COURT OF SOUTH AFRICA IN THE PRE-PAID WATER METERS CASE<sup>1</sup>**

## **SUMMARY OF JUDGMENT DELIVERED ON 30 APRIL 2008**

The Court ruled that the City of Johannesburg's practice of forced installation of prepayment water meters in Phiri, Soweto is unconstitutional and unlawful. The Court also ordered the City to provide residents of Phiri with 50 litres of free basic water per person per day, setting aside the City's decision to limit free water to 25 litres per person per day. The City was also directed to provide residents of Phiri with the option of a metered water supply.

### **ISSUES BEFORE THE COURT**

The application by five residents of Phiri, supported by the Centre for Applied Legal Studies and the Coalition Against Water Privatisation, challenged the legality and constitutionality of the City's policy of imposing prepayment water meters as well as regulation 3(b) of the Regulations relating to compulsory National Standards and Measures to Conserve Water which define basic water supply as 25 litres per person per day or 6000 litres per household per month, upon which the City's policy is based.

The applicants asked the City to provide them and others similarly placed with 50 litres of free water per person per day and the option of water credit which is afforded to the wealthier and largely white residents of Johannesburg. The Geneva-based Centre on Housing Rights and Evictions (COHRE) with assistance from the New York University School of Law's International Human Rights Clinic and the Legal Resource Centre of South Africa, submitted an amicus brief primarily based on international and comparative law which argued that the imposition of prepaid water meters is discriminatory and retrogressive and hence violates international law<sup>2</sup>.

### **KEY ASPECTS OF THE COURT DECISION**

#### **Forced installation of prepayment meters unconstitutional, infringe national standards, violate procedural fairness and contravene the right to equality**

The Court noted that the prepayment meters cause an automatic shut-off when the free basic water allocation is exceeded and a household has insufficient funds to purchase water. In the case of the applicants, this meant that they went without water for the last 15 days of each month, contravening national standards which

---

<sup>1</sup> LINDIWE MAZIBUKO & ORS V THE CITY OF JOHANNESBURG & ORS, CASE NO. 06/13865, High Court of South Africa (Witwatersrand Local Division). For the purposes of brevity, references in this note to the 'City' also apply to Johannesburg Water, a water company in which the City of Johannesburg is the sole shareholder.

<sup>2</sup> The amicus brief, and the court's judgement, is available at [www.cohre.org/watersa](http://www.cohre.org/watersa). The submissions of the applicants and respondents are available at: <http://www.law.wits.ac.za/cals/phiri/index.htm>

require that no consumer is without water for more than 7 full days in a year. The Court further held that the implementation of prepayment meters with automatic shut-off mechanism is unlawful, unreasonable and violates the Constitution and the Promotion of Administrative Justice Act 2000 (which guarantee the right to lawful, reasonable and procedurally fair administrative action) as it does not give reasonable notice to enable representations to be made prior to any cut-off of water.

The Court also addressed this issue in broader terms, holding that the forcible imposition of prepayment meters contravene the right to equality. It noted that residents in wealthy, historically white areas get water on credit from the City, are entitled to notice before any cut-off of water supply and have the opportunity to make arrangements to settle arrears, including an opportunity to make representations to the City. Conversely, residents of a poor and predominantly black area do not have these entitlements. This, in the view of the Court is not only unreasonable, unfair and inequitable; it is also discriminatory solely on the basis of colour.

The Court also held that in view of the fact that domestic chores are performed by women, with many households in poor black communities headed by women, prepayment meters within this context discriminate against women unfairly because of their sex.

The Court rejected the City's argument that prepayment systems had been widely accepted by residents. The Court examined the process by which these systems had been introduced, and concluded that it had been procedurally unfair, lacking consultation, adequate notice, advice on legal rights, and information provided to the users on available remedies. The Court also rejected the City's argument that prepayment meters were beneficial for users in Phiri who could not afford water on credit. The Court termed such an attitude as deeply patronising, and discriminatory, noting that bad payers cannot be described in terms of colour or geographical areas, as the City's policy implied.

### **Two hundred litres per household per day insufficient**

The Court rejected the applicants request to declare unconstitutional the national regulation on water supply, which provide for a minimum quantity of potable water of 25 litres per person per day or 6000 litres per household per month. Taking into account international guidelines stating that 25 litres per person per day provides essential - although still insufficient - needs, the Court stated that the minimum standard was understandable given South Africa's resource challenges, but that it must be viewed as a 'floor and not a ceiling'. Depending on its resources and the needs of its residents, Water Services Authorities are obliged to progressively realise the right, and may increase the minimum as exemplified by the local authority of Volksrust in Kwazulu-Natal, which went above the national minimum amount and defined free basic water, taking into account waterborne sanitation, as 9000 litres per household per month and Mogale City which provides 10,000 litres per household per month.

In the case of Phiri, the Court noted that the applicants need more water than the 25 litres per person per day. The Court noted that it takes 10-12 litres to flush a toilet in areas of water-borne sanitation and that many residents suffer from HIV-AIDS, therefore requiring extra water. It stated that in this context, water-borne sanitation is a matter of life and death. The court accepted expert evidence that 50 litres was required for residents of Phiri in view of their circumstances. The judgement further noted that the average household in Phiri contains a minimum of 16 persons, and in addition many connections are shared by residents. Thus, the 6000 litre allocation per month meant that many persons would receive far less (or none) of the 25 litres per day.

The Court noted that the City had established an Indigency Policy, whereby applicants may be granted an increased allocation of water, up to 10,000 litres per month. However, it determined that this system is insufficient, as the benefits are provided per account holder, which excludes the common situations where multiple households share a stand, as in Phiri. In addition, social stigma makes people reluctant to register. The scheme did not permit representations for further allocations of free water. Finally, this scheme requires applicants to agree to the installation of prepayment meters as a condition for an increased allocation.

The Court noted that it had not been contested that the City had the financial resources to increase the amount of water required by the applicants, including by channelling the water supplied for free to households that can afford to pay for them and by using the funding provided to the City by the national government for the purposes of water supply. Given that the applicants needed more than 25 litres per person per day, and that the City had the available financial and water resources, the court held that it was unreasonable to limit supply to 25 litres per person per day. The Court therefore ordered the City to provide the applicants and other similarly placed residents of Phiri with free basic water supply of 50 litres per person per day.

### **Free Basic Water for the Poor a Constitutional Requirement**

The Court rejected the argument by the Ministry of Water Affairs and Forestry (which was also a respondent in the case) that it was not legally obliged to provide free basic water. The Court noted that on the basis of the Constitution, taking into account international law, the State is obliged to ensure free basic water to the poor

### **IMPLICATIONS FOR POLICY ON PREPAYMENT WATER METERS IN SOUTH AFRICA AND INTERNATIONAL IMPLICATIONS**

Even though this judgment will probably be appealed, the decision settles at least for the time being what activists have long been arguing: that the introduction of prepayment meters particularly in poor communities can inhibit the right of access to water as they do not take into account inability to pay or the specific needs of users. This decision is a warning shot against attempts to forcibly impose prepayment water systems on the poor in South Africa, elsewhere in Africa and globally, given their procedurally unfair and arbitrary consequences on the right to water. The

decision will no doubt embolden opponents of this system to take their activism to the courts. It will hopefully provide residents in townships such as Soweto, as well as broader civil society, a mobilising tool to ensure that the desired real changes on the ground are realised.

The judgment incorporates a heightened awareness of the social and economic context of poor communities in South Africa, the best of South African jurisprudence, and extensively used international law and comparative jurisprudence to aid its interpretation of domestic laws. It lends credence to the view that domestic courts can be progressive in their interpretation of domestic human rights provisions, an act worthy of emulation by courts elsewhere.

Significantly, the judgment dispels the erroneous notion that existing Constitutional Court jurisprudence in South Africa rejects the concept of minimum core obligations. Referring to two land mark decisions, *Grootboom* and *Treatment Action Campaign*, the judgment maintains that it is possible to determine the core minimum if sufficient information is placed before a Court.

In addition, by carefully assessing the City's Indigency Policy, the Court showed that aiming to target the poor through individual means-testing has its limits. The Court's remedy therefore applied to all residents of Phiri, not just those who the City considered as indigent. This was a significant decision, given that examples from other countries show that geographically based subsidies - particularly where poverty is concentrated, as in townships and informal settlements - can help remedy the under-inclusion that is prevalent in individual means testing.<sup>3</sup>

The Court's decision that free basic water for the poor is a Constitutional requirement is significant even though the national government has a free basic water policy. This is because, even going by government figures, a significant proportion of low-income South Africans do not yet have access to free basic water, and this decision will put pressure on municipalities to extend free basic water. In addition, the decision will help protect poor users against disconnection from water in situations where they cannot afford to pay.

Finally, by anchoring the quantity of basic water to the principle of need and resources and in this case raising the threshold of free basic water from 25 to 50 litres in appropriate situations, the Court showed that the obligation to progressively realise social and economic rights has real and unequivocal duties, by which government bodies can be held accountable.

*Prepared by Sonkita Conteh, Legal Officer, and Ashfaq Khalfan, Coordinator, COHRE Right to Water Programme. See [www.cohre.org/water](http://www.cohre.org/water) and [www.cohre.org/watersa](http://www.cohre.org/watersa).*

---

<sup>3</sup> See Section 10.6 of COHRE, AAAS, SDC, UN-HABITAT, Manual on the Right to Water and Sanitation (2007), , [www.cohre.org/manualrtws](http://www.cohre.org/manualrtws).